SEE NYUK FUNG & ORS.

v.

PAN GLOBAL EQUITIES BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-279-1990]
26 NOVEMBER 1990

COMPANY LAW: *Application for using of omission defect, error or irregularity - Identification - Whether there was anything for the Court to rectify or validate - Requirements of s. 355(3) - Remedy for consequences which flow from breach - Has to be a breach - Court has no power to rectify or validate something which has not occurred - Basis for exercising Court's discretionary power of rectification or validation - Companies Act 1965 ss. 150, 355.*

On 12 December 1990, a director of the respondent company applied to the High Court, under ss. 150 and 355(3) Companies Act 1965 (the Act) for an order that the respondent company convene an extraordinary general meeting to consider, and if deemed fit, to pass five resolutions in connection with the purchase of five properties transacted in 1987-88 worth approximately RM14.75 million. The Court granted the order on 28 March 1990. The appellants who were supporters of the 'interim directors' who had replaced the 'original directors' at the general meeting of the respondent company, applied to intervene and to set aside the order on the ground that the order was outside the purview of s. 355 of the Act. The High Court dismissed the application; hence this appeal.

The parties were also involved in current litigation as to whether the purchase of the properties were in breach of ss. 67 and 132C(1) of the Act.

Held:

[1] In the absence of a written judgment by the High Court, no one really knows on what basis the discretionary power of the Court has been exercised in relation to s. 355(3) of the Act. There is no way of knowing what defect, error, irregularity or omission the trial Judge thought fit to rectify.

[2] (a) The properties were purchased without reference to a general meeting in the first instance.

(b) The Court cannot order the calling of a meeting of the shareholders to consider validating the breach, because the Court can only make an order under s. 355(3) to remedy the consequences which flow from the breach, and calling the EGM to consider the five resolutions is not a consequence of the breach but to supply the deficiency itself which has occurred.

(c) By granting the order, the Court is not validating anything, but merely allowing the original directors to have a second bite at the cherry. This is clearly outside the purview of s. 355(3).

(d) Under the section, the validation of an invalid act, matter or thing must be by the Court and not by the EGM. Unlike its power of rectification and modification, the Court cannot cause a third party to validate or to consider validating an unlawful act under the Companies Act.

[3] (a) It is only after such a meeting is held to consider the resolution that the validity of the meeting could if at all be remedied under s. 355(3) notwithstanding that it was held out of time.

(b) Under s. 355(3), the Court has no power to rectify anything which has yet to occur, or to validate any act which is not yet in breach of the Companies Act. Any omission or irregularity or defect in the general meeting can only be determined after the meeting has been held, but not before.

(c) To allow the rectification at this stage would certainly do injustice to the appellants and as well as to PanGlobal.

(d) This requirement under para. (b) of s. 355(3) did not seem to have been considered at all by the learned Judge before exercising his remedial power under this provision.

[4] The learned trial Judge had exercised his discretion under s. 355(3) the Act on wrong principle; there is, of course, nothing to stop the respondent from calling an extraordinary general meeting at any time on their own without the assistance of the Court to consider the five resolutions. On the facts of the present case neither the assistance of s. 150 nor s. 355(3) is necessary or warranted.

[Appeal allowed.]

Cases referred to:
Langton v. Forsayth Mineral Exploration N.L. [1974 - 1976] 1 ACLR 227
Re Abel Equipment Pty. Ltd. (in liquidation) [1977 - 78] 3 ACLR 741
Re Clearwater Pty. Ltd. [1981] - 82] 6 ACLR 201
Re Eraville Pty. Ltd. [1980 - 81] 5 ACLR 203
Re Helen Investments Pty. Ltd. [1981 - 82] 6 ACLR 736
Re Kallin Investment Ltd. [1981- 82] 6 ACLR 104
Re Lancer Corporation Pty. Ltd. [1981 - 82] 6 ACLR 157
Re Newman Pastoral Co. (No. 2) Pty. Ltd. [1980 - 81] 5 ACLR 510

Legislation referred to:
Companies Act 1965, ss. 67, 132(C)(1), 132E(3), (6), 150, 257, 355(3),
Companies Act, [Aust] s. 366

For the appellants - Loh Siew Cheang (Agie Poh Chew with him); M/s. Cheang & Ariff
For the respondents - K.S. Narayanan (Y.K. Leong with him); M/s. Riza Leong & Partners

JUDGMENT

Mohd. Azmi SCJ:

By *ex parte* originating summons dated 12 February 1990, Mr. Wong Swee Min, a director of respondent company (PanGlobal) applied for relief under ss. 150 and 355(3) Companies Act 1965 whereby the High Court should order PanGlobal to convene an Extraordinary General Meeting for the purpose of considering and if deemed fit, to pass five resolutions in connection with the purchase of five properties transacted on 30 April 1987 and 5 May 1988 at a total price of RM14.75 million. The application was granted by an order in chambers dated 28 March 1990. Though not strictly relevant for the purpose of this appeal, on 10 May 1990 the order was slightly varied to include certain particulars of the property transactions. By summons-in-chambers dated 25 May 1990, the present appellants and others who are minority shareholders applied to intervene, and upon leave being granted to the appellants, they applied for the setting aside wholly of the *ex parte* order of 28 March, on

the ground that the subject of the application is not within the purview of s. 355(3) of the Act. On 26 June 1990, the learned Judge dismissed the interveners application to set aside; issued a certificate of no further argument, and granted them leave to appeal to this Court.

In dealing with this appeal, we do not have the benefit of a written judgment of the High Court. All that we have is the following findings by the Court in the notes of evidence at p. 45 of the appeal record.

> Court: The primary issue is whether the Court has the power to order the AGM.
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> I say that under s. 355(3) Companies Act there is a wide scope given to the Court to order an act to remedy an irregularity.
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> The application encl. (14) para. 2 dismissed with costs.

In the circumstances, apart from being told that the scope of s. 355(3) is wide, no one really knows on what basis the power of the Court under s. 355(3) of the Companies Act 1965 has been exercised. We do not exactly know the nature of the defect, error, irregularity or omission which the learned Judge has thought fit to rectify. The relevancy of this matter will become more apparent later.

Paragraphs (a) and (b) of s. 355(3) provide:

> (3) Without affecting the generality of subs. (1) and subs. (2) or of any other provision of this Act, where any omission defect error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to s. 257, the Court:
>
> (a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result or any such omission, defect, error or irregularity;
>
> (b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;

It is abundantly clear that before that section can be applied in the present case, it is essential to identify the omission, defect, error or irregularity, which is alleged to have occurred in the management or administration of PanGlobal.

For a proper understanding of the dispute between the parties, it is necessary to go slightly into the circumstances which led Mr. Wong Swee Min to apply for the relief under s. 355(3).

The appellants were supporters of the "interim directors" who had replaced the "original directors" at the general meeting of PanGlobal. Five of them were elected to office at an extraordinary general meeting of shareholders held on 5 September 1988 whilst another three became directors subsequently on 8 June 1989. On the application of the original directors, namely Dato' Mak Kok, Mr. Lee Kok Liang and Mr. Wong Swee Min, *vide* Civil Suit No. D4-22-186-88, all the eight interim directors were restrained on 7 September 1988 by *ex parte* interim injunction issued by Zakaria Yatim J from acting as or exercising any of the functions or performing any of the duties of directors of PanGlobal until after the trial of the action,

and it was also ordered that the original directors be restored to the *status quo* prior to the EGM held on 5 September 1988. Subsequently, the *ex parte* order of 7 September 1988 was set aside by Zakaria Yatim J on 30 May 1989 on the application of the interim directors, after hearing full argument and considering written submissions. However, on appeal to the Supreme Court, it was ordered on 27 September 1989 that the setting aside order of Zakaria Yatim J dated 13 May 1989 be reversed and the original *ex parte* order of 7 September 1988 be restored, thereby suspending the decision of PanGlobal's EGM which voted five of the interim directors into office.

During the short-lived period of the interim directorship, the interim directors had discovered material irregularities in the purchase of the five properties. According to the affidavit of Mr. Liau Thai Min (9th appellant) dated 23 May 1990, and his further affidavit dated 8 June 1990, the five transactions entered into by the original directors were illegal because firstly, the purchase of the five properties dated 30 April 1987 and 5 May 1988 were director-related transactions, and were deliberately entered into in breach of s. 132E(1)(5) read together with s. 122A of the Companies Act. Secondly, the transactions were devised by the original directors to utilise the funds of PanGlobal to finance the acquisition or subscription of PanGlobal shares in contravention of s. 67. A police report No. 18774/1989 had been lodged by the interim directors. They had consequently revoked the decision of the original directors to purchase the five properties, and they had also caused PanGlobal to issue a writ against the original directors *vide* Civil Suit No. D1-22-1785-89 for recision of the five transactions and for repayment of all monies paid by PanGlobal under the sale and purchase transactions, reimbursement of all expenditures, and damages for breach of contract, breach of fiduciary duties and for negligence. The action is now held in abeyance on instruction of the original directors, pending the outcome of their own suit against the interim directors, namely Civil Suit No. D4-22-186-88, the early trial of which has been ordered by the Supreme Court before another Judge. It must be noted that the consequence to a director for contravening s. 132C(1) is personal accountability to any profit under s. 132E(3) and criminal liability under s. 132E(6) of the Act. The alleged civil and criminal liabilities are not conceded in the present application for relief. Indeed, reading Mr. Wong Swee Min's affidavit in support dated 12 February 1990, the application is not founded on any irregularity under s. 67 or 132C(1), as alleged by the appellants, but the purpose of the Court's assistance in calling for the general meeting is principally based on the following two grounds:

(i) The difficulties in the finalisation of PanGlobal's annual account arising from the uncertainty as to the manner in which the account should treat the purchase of the five pieces of properties by the company and one of its wholly-owned subsidiary companies called, PanGlobal Development Sdn. Bhd. (see para. 6 of affidavit).

(ii) The desires of the original directors to be strictly impartial over the final fate of the five transactions. The shareholders should freely endorse or revoke the transactions and for that purpose the original directors thought it fit not to be a party to the calling of this particular EGM, without the assistance of the Court (see paras. 17 and 19 of affidavit).

In our view, none of the reasons given can constitute an omission, defect, error or irregularity which has occurred in the management or administration of the company as required by s. 355(3) which empowers the Court to exercise its discretionary power of rectification or validation. On the facts affirmed by Mr. Wong Swee Min, in his affidavit-in-support, there is nothing for the Court to rectify or to validate. The Court was not asked to rectify or validate anything. The Court cannot act in vacuum under s. 355(3). Before there can be a basis for

rectification or validation by the Court, a breach of the Companies Act must have occurred, or a default in the observance of the company's memorandum and articles must have taken place, or a company's or directors' meeting must have been rendered ineffective. Here, no breach of any kind has been particularised and conceded by Mr. Wong Swee Min, to render the purchase of the five properties void or ineffective.

The learned Counsel for the appellants has submitted that our s. 355(3) is equivalent to s. 366 of the old Australian Companies Act. According to him, the section applies only to rectification of procedural defects or irregularities, but not to supply the deficiency which caused the irregularity or defects. The Court can only validate procedural irregularities or defects, such as defects in advertisements - *Langton v. Forsayth Mineral Exploration N.L.* [1974 - 1976] 1 ACLR 227, 237; lack of quorum of meeting, - *Re Eraville Pty. Ltd.* [1980 - 81] 5 ACLR 203 & Companies Act; short notice of meeting - *Re Newman Pastoral Co. (no. 2) Pty. Ltd.* [1980 - 81] 5 ACLR 510; deficiency in explanatory statements - *Re Kallin Investment Ltd.* [1981 - 82] 6 ACLR 104; short notice to shareholders - *Re Clearwater Pty. Ltd.* [1981 - 82] 6 ACLR 201; defective appointment of liquidator - *Re Abel Equipment Pty. Ltd. (in liquidation)* [1977 - 78] 3 ACLR 741; and late lodgment of declaration of solvency - *Re Helen Investments Pty. Ltd.* [1981 - 82] 6 ACLR 736.

The learned Counsel also cited *Re Lancer Corporation Pty Ltd.* [1981 - 82] 6 ACLR 157, 170, where the Supreme Court of Queensland held:

> Under s. 366(l) and (2) the Court in a proceeding before it may declare that a proceeding under this Act" is valid notwithstanding any defect, irregularity or deficiency. Under s. 366(3) the power of the Court in consequence of any omission, defect, error or irregularity ... in the management or administration of a company ..." whereby any of the consequences set out have occurred, is likewise not to declare that what has occurred is invalid. Nor is there a power to order that steps or actions be taken consequent upon such a declaration. The Court may "rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity. Or the Court may validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity. In other words, s. 366(3) is clearly directed to the modification or the negativing of the otherwise invalidating effect flowing from any "omission, defect, error or irregularity" as set out.

In short, the submission of the learned Counsel is that the remedial power is exercised in two ways:

(i) by making an order to rectify the consequences which follow the defective act, or,

(ii) by declaring altogether valid what is invalid.

Next, the learned Counsel referred to *Langton v. Forsayth Mineral Exploration N.L.* [1974 - 1976] 1 ACLR 227, 237, where Mahoney JA of the Supreme Court of New South Wales held:

> In respect of matters which depend for their correction or validation upon the exercise of the powers given by s. 366(3), the position is different. It is, in my opinion, clear that unless and until the Court makes an order, the matters remain in their defective form; and before any such order can be made, the Court shall satisfy itself that the order "would not do injustice to the company or to any member or creditor thereof".

In our opinion, in this case, if application had been made for the Court to validate the five transactions, notwithstanding any breach of the provisions of the Companies Act, it would have been a different matter. The properties were purchased without reference to a general meeting in the first instance. So, the Court cannot order the calling of a meeting of the

shareholders to consider validating the breach, because the Court can only make an order under s. 355(3) to remedy the consequences which flow from the breach, and calling the EGM to consider the five resolutions is not a consequence of the breach. It is to supply the deficiency itself which has occurred. We are of the view that by granting the order, the Court is not validating anything, but merely allowing the original directors to have a second bite at the cherry. This is clearly outside the purview of s. 355(3). The original directors must admit first that there is a breach by way of an omission to comply with the Companies Act, before there can be validation by the Court. Under the section, the validation of an invalid act, matter or thing must be by the Court and not by the EGM. Unlike its power of rectification and modification, the Court cannot cause a third party to validate or to consider validating an unlawful act under the Companies Act.

Before us the Counsel for the respondent when queried for the actual need to come to Court for validation or rectification explained that because the EGM had not been held within a reasonable period after the five transactions, there was inability to satisfy the reasonable time requirement. Therefore, respondent sought assistance of the Court to enable it to satisfy "the reasonable time" requirement. This is not specifically deposed in the affidavit-in-support of Mr. Wong Swee Min. Even if it had been so deposed, s. 355(3) would still not be applicable. There is admittedly nothing to stop the respondent from calling the EGM without the assistance of the Court to consider the resolutions. It is only after such a meeting is held that the validity of the meeting could if at all be remedied under s. 355(3) notwithstanding that it was held out of time. Under the sub-section, the Court has no power to rectify anything which has yet to occur, or to validate any act which is not yet in breach of the Companies Act. Any omission or irregularity or defect in the general meeting can only be determined after the meeting has been held, but not before.

Further, as stated earlier on, the appellants' allegations that the five transactions are in breach of s. 67 and s. 132C(1) of the Companies Act are contentious issues between the interim and original directors, and they are yet to be determined by the Court. To allow the rectification at this stage would certainly do injustice to the appellants and as well as to PanGlobal. This requirement under para. (b) of s. 355(3) did not seem to have been considered at all by the learned Judge before exercising his remedial power under this provision. In this appeal we cannot and do not make any finding on the various allegations levelled against the original directors, particularly against Dato' Mak Kok. In our view, these allegations should be resolved in Civil Suit No. D4-22-186-88 or civil suit D1-22-1785-89 so that neither the interest of PanGlobal nor that of the original or interim directors be prejudiced in any way.

Thus merely because s. 355(3) confers a wide range of remedial discretion to the Court does not mean that it is an unfettered discretion. We are of the opinion that the learned Judge had exercised his discretion under s. 355(3) of the Companies Act on wrong principle, and as such the order dismissing the appellants' application must be set aside. There is of course nothing to stop the respondent from calling an EGM at any time on their own without the assistance of the Court, to consider the five resolutions. On the facts of the present case neither the assistance of s. 150 nor s. 355(3) is necessary or warranted.

The appeal is accordingly allowed with costs, and the application of the appellants to set aside wholly the *ex parte* order of 28 March 1990 must therefore be allowed.

Also found at [1991] 1 CLJ 452